

Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Courts Legislation Amendment (Judicial Complaints) Bill 2012* and the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012*

This submission is made in response to the invitation from the Senate Standing Committee on Legal and Constitutional Affairs to the Judicial Conference of Australia (JCA). The Committee has invited written submissions as to the *Courts Legislation Amendment (Judicial Complaints) Bill 2012* (“the Complaints Bill”) and the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Bill 2012* (“the Parliamentary Commissions Bill”).

As the Committee may be aware, in 2010 the Governing Council of the JCA resolved to support and promote a structured system of dealing with complaints against judicial officers in every Australian jurisdiction, with such variations as are appropriate from court to court given differences in financial and other circumstances. It supports in each jurisdiction a mechanism for dealing with complaints against judicial officers which preserves judicial independence, is appropriately transparent and promotes justice as between the complainant and the judicial officer. The JCA’s position is that this would serve, in particular, that object of the JCA which is to maintain, promote and improve the quality of the judicial system in Australia.

Therefore the JCA supports the evident policy of these Bills. Their drafting shows a close attention to the relevant interests and considerations, most importantly the preservation of the independence of the judiciary. There is but one matter about which the JCA submits that an amendment is necessary.

That matter is the absence of a provision in the Complaints Bill for the payment of costs (if any) incurred by a judicial officer in responding to a complaint. In particular, there is the potential for the judicial officer to incur costs where the head of jurisdiction decides to “handle the complaint” by an investigation. Using the provisions relevant to the Federal Court of Australia as an example (there being identical provisions proposed for the Family Court of Australia and the Federal Magistrates Court), the proposed s 18XA(4) specifically anticipates an investigation in which there will be legal representation at a hearing in the course of the handling of

a complaint. However, no provision is made for the payment of the costs of the judicial officer in that circumstance.

This is in contrast to the Parliamentary Commissions Bill. Clause 45 of that Bill provides that the Commonwealth will be liable to pay the reasonable costs of legal representation for the judicial officer in relation to whom an allegation of misbehaviour or incapacity is investigated under that statute. That is an important and appropriate provision which should be replicated within the Complaints Bill. The reason for its absence is difficult to identify.

In essence, there are two reasons why such a provision should be inserted in the Complaints Bill. One is to provide that fairness to the judicial officer which cl 45 of the Parliamentary Commissions Bill well recognises. Secondly and importantly, such a provision would encourage judicial officers to participate fully and voluntarily in the handling of the complaint. Necessarily, the participation of a judicial officer in this process must be voluntary. It would be regrettable if the operation of this statute was affected by a reluctance on the part of judicial officers to cooperatively participate, for fear of the burden of the cost of necessary legal representation.